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Nos. 98-758 and 98-762

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM A. FICKLING, JR., ET AL.,
PETITIONERS

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

SOUTH CAROLINA NATIONAL BANK,
PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

1. Whether res judicata bars a suit by the Secretary of Labor under Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a) (1994 & Supp. II 1996), insofar as the Secretary seeks monetary relief against defendants who have previously settled ERISA claims brought against them by private parties.

2. Whether Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), authorizes an action by the Secretary for equitable relief against parties in interest who have engaged in a transaction prohibited by Section 406(a) of ERISA, 29 U.S.C. 1106(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-758

WILLIAM A. FICKLING, JR., ET AL.,
PETITIONERS

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

No. 98-762

SOUTH CAROLINA NATIONAL BANK,
PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (98-758 Pet. App. 1a-30a; 98-762 Pet. App. 1a-28a) is reported at 140 F.3d 1413. The orders of the district court granting partial summary judgment to the petitioners in No. 98-758 (98-758 Pet. App. 35a-37a) and dismissing the Secretary's claims for monetary relief against the petitioner in No. 98-762 (98-758 Pet. App. 38a-50a; 98-762 Pet. App. 29a-39a, 43a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1998, and a petition for rehearing was denied on August 10, 1998 (98-758 Pet. App. 31a-34a; 98-762 Pet. App. 40a-42a). The petition for a writ of certiorari in No. 98-758 was filed on November 9, 1998 (a Monday), and the petition in No. 98-762 was filed on November 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The petitioner in No. 98-762, South Carolina National Bank (SCNB), was the trustee of an employee stock ownership plan (ESOP) created by the Charter Medical Corporation (Charter). 98-758 Pet. App. 3a.[1] As such, SCNB was a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Among other things, ERISA requires a fiduciary to exercise its responsibilities solely in the interest of the plan's participants and beneficiaries, for the exclusive purposes of administering the plan and providing benefits, and with a high degree of prudence. 29 U.S.C. 1104(a)(1)(A) and (B).

A plan fiduciary also must not cause the plan to engage in certain "prohibited transactions," including (with some exceptions) a sale or exchange of property involving, or a transfer or use of plan assets to or for the benefit of, a "party in interest." 29 U.S.C. 1106(a)(1)(A) and (D). The petitioners in No. 98-758 include William A. Fickling, Jr., the President and Chairman of the Board of Directors at Charter, and some of his relatives and related entities (the Fick-

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[1] Unless otherwise indicated, all appendix references are to the appendix in No. 98-758.

lings), who at relevant times were parties in interest under 29 U.S.C. 1002(14) with respect to the Charter ESOP. Pet. App. 3a, 8a n.9.[2]

In February 1990, SCNB paid $80 million from plan assets to the Ficklings for stock in Charter, a closely held corporation. Pet. App. 3a. Under ERISA, that purchase was exempted from the "prohibited transaction" rules of 29 U.S.C. 1106 if, but only if, it met certain statutory conditions, including that it be for "adequate consideration." 29 U.S.C. 1108(e); see Pet. App. 9a n.10, 24a n.20. As trustee of the plan, SCNB was responsible for determining the value of the stock to be received in the transaction, which was not publicly traded and had no established market price. See *id.* at 3a n.2. After a subsequent investigation, see 29 U.S.C. 1134, the Secretary of Labor determined that SCNB had improperly evaluated the effect of more than $1.5 billion in corporate debt on the value of Charter's stock, and that a reasonable investigation by SCNB would have disclosed that the stock was essentially worthless. See Pet. App. 3a n.2, 4a. Charter later filed for bankruptcy. See *id.* at 54a; 98-758 Pet. 3.

2. While the Secretary was investigating the 1990 transaction, participants and beneficiaries of the ESOP brought a class action against Charter, a number of the Ficklings, SCNB, and others (the *Knop* action). Pet. App. 4a. That suit alleged violations of ERISA, federal securities laws, and state law in the February 1990 stock purchase and in a similar $375 million purchase in

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[2] It is undisputed that Mr. Fickling is a party in interest, and the court of appeals assumed for purposes of its decision that the other Fickling petitioners were as well. The court of appeals directed the district court, on remand, to allow the parties to complete discovery on that issue. Pet. App. 8a n.9, 29a n.26.

1988. *Ibid.* In March 1992, the Secretary, who was not a party to the *Knop* action, learned that the private litigants were settling with all defendants. *Ibid.* The Secretary informed the parties to the *Knop* action that she was conducting an investigation, that she might bring suit, and that she would not be bound by any private settlement in *Knop*. *Ibid.* On April 6, 1992, the Secretary received fully executed settlement documents entered into by the parties to the *Knop* action. *Id.* at 4a, 60a. On April 9, 1992, the Secretary restated her position in a letter to counsel for all the private litigants:

> We have also been informed that the parties to the *Knop Action* may have the understanding that the Secretary can, may, or will be bound in some way by the terms of any settlement entered into in the *Knop Action*. Such an understanding is unfounded.
>
> The Secretary was not a party to the settlement and will not be bound by any part of the settlement; in fact, the Secretary is continuing her investigation of the Charter [ESOP] regarding possible violations of [ERISA].
>
> In the event the Department concludes that ERISA violations occurred, you should be aware that we will take whatever enforcement action, including litigation, which we deem to be appropriate. While we do not wish to make the chances of settling the *Knop Action* any less likely, we feel that it would be disingenuous to allow it to go forward without making the above clear to the parties to such settlement.

Id. at 60a. None of the parties to the *Knop* action sought to join the Secretary as an additional party. *Id.* at 4a.[3]

On April 30, 1992, counsel in *Knop* informed the district court that the Secretary "had no desire to impede the proposed settlement but that [her] silence should not be taken as restricting whatever [she] might do in the future." Pet. App. 5a. The district court then approved the settlement of the class action, contingent upon confirmation by the bankruptcy court of a plan of reorganization for Charter. *Id.* at 51a-55a. Under the settlement, claims against all defendants, including the Ficklings and SCNB, were dismissed with prejudice. *Id.* at 5a, 54a. In return, Charter provided certain benefits to the ESOP and its participants and beneficiaries, primarily $12.3 million paid into a new retirement plan established as a subplan of the ESOP. *Id.* at 5a, 42a-43a. The Ficklings and SCNB did not contribute any cash to the settlement. *Id.* at 5a.[4]

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[3] The Ficklings state that the Secretary was "kept informed" concerning the *Knop* proceedings and offered "no further dissent" after one settlement proposal she viewed as inadequate was "substantially sweetened." 98-758 Pet. 3. The Secretary had expressed an opinion only as to recovery from Charter itself in bankruptcy proceedings, not as to the appropriate liability of any of the parties the Secretary is suing here. R17-169 at 10, 50. The Ficklings also repeat (98-758 Pet. 6) the district court's inaccurate assertion (Pet. App. 45a) that the Secretary "concedes" that she received "all of the information and documents upon which [her] present claims are based" before the district court's April 30, 1992, hearing on the *Knop* settlement. The Secretary made no such concession in the district court, and the court of appeals relied on other grounds in rejecting the district court's ruling with respect to laches. Pet. App. 27a-29a, 45a-46a.

[4] The Ficklings suggest that they gave up valuable rights as part of the settlement. 98-758 Pet. 4 n.3. As the court of appeals

In June 1992, the Secretary informed petitioners' attorneys that, although her investigation had not concluded, she had determined that the 1990 stock purchase violated ERISA. R19-1, Exh. A; see Pet. App. 43a. She outlined the relief she sought, and asked petitioners to discuss the matter with a view to resolving it through a consent order. R19-1, Exh. A. SCNB responded by filing both a third-party complaint against the Secretary in the *Knop* action and a separate action for declaratory relief, in each case alleging that the *Knop* settlement barred the Secretary from obtaining additional relief. Pet. App. 5a.

On July 24, 1992, the Secretary filed her own action against petitioners, alleging that SCNB had transferred $80 million in plan assets to the Ficklings in exchange for essentially worthless stock, in violation of Sections 404(a)(1)(A) and (B) and 406(a)(1)(A) and (D) of ERISA, 29 U.S.C. 1104(a)(1)(A) and (B), 1106(a)(1)(A) and (D). See Pet. App. 3a, 6a. The Secretary sought damages from SCNB and disgorgement of the $80 million paid to the Ficklings in the 1990 transaction (both subject to being offset by sums recovered in the *Knop* litigation) and injunctive relief, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (a)(5). Pet. App. 6a; see also ERISA § 502(*l*), 29 U.S.C. 1132(*l*) (civil penalties).[5] The Secretary's suit was later consolidated

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noted (Pet. App. 5a n.4), the Secretary believes that the reverse is true, and that in any event any contribution from the Ficklings was of negligible value.

[5] Section 1132(a)(2) allows a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under" 29 U.S.C. 1109. Section 1109 makes a fiduciary personally liable for, among other things, plan losses resulting from breaches of fiduciary duty. The Secretary's claim for monetary relief against SCNB is based on those provisions. The Secretary's claims

with SCNB's two actions against the Secretary. Pet. App. 6a.

3. In June 1993, the district court granted summary judgment to the Ficklings on the Secretary's disgorgement claim, without analysis other than a citation to *Useden* v. *Acker*, 947 F.2d 1563 (11th Cir. 1991), cert. denied, 508 U.S. 959 (1993). Pet. App. 35a-37a. *Useden* held that 29 U.S.C. 1109(a) and 29 U.S.C. 1132(a) (1994 & Supp. 1996) do not create a cause of action for money damages against a non-fiduciary for participation in a fiduciary breach. 947 F.2d at 1582.

In November 1996, the district court granted a further partial summary judgment to SCNB, denying the Secretary's claim for monetary relief against SCNB. Pet. App. 38a-50a. The court held that its judgment implementing the *Knop* settlement precluded the Secretary's claim under Section 1132(a)(2), on the grounds that the Secretary's claim was the same as one asserted by the *Knop* plaintiffs, that there was "substantial identity of the parties" in the two cases (*id.* at 47a), and that the Secretary could have intervened in the *Knop* action under 29 U.S.C. 1132(h), but chose not to do so. Pet. App. 46a-50a. The court reserved judgment, however, on whether the Secretary could sue for

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for injunctive relief against SCNB and for restitution against the Ficklings are based on Section 1132(a)(5), which authorizes an action by the Secretary to enjoin violations or to obtain "other appropriate equitable relief" to redress violations or enforce the Act. Section 1132(*l*) requires the Secretary to assess civil penalties in cases involving breaches of duty or other violations by fiduciaries, or knowing participation in such a breach or violation by "any other person."

"appropriate equitable relief" under Section 1132(a)(5). *Id.* at 48a n.1.[6]

In January 1997, the Secretary settled her claims for injunctive relief against SCNB, after SCNB agreed never to serve as trustee for the Charter ESOP and not to serve as a trustee for any ESOP for three years. See Pet. App. 7a & n.7. The district court then entered final judgment, and the Secretary appealed. *Id.* at 7a; 98-762 Pet. App. 46a-47a.

4. The court of appeals reversed in part, vacated in part, and remanded. Pet. App. 1a-30a. The court first held that the Secretary could sue the Ficklings, as parties in interest, for equitable relief under Section 1132(a)(5), including disgorgement of profits from the 1990 stock transaction. *Id.* at 9a-17a. The court relied (*id.* at 14a-17a & n.14) on its earlier decision in *Useden*, on the holdings of other courts of appeals, and on portions of this Court's opinions in *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 889 n.3 (1996), and *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 253-254, 262 (1993).

The court also held that the private settlement in *Knop* did not bar the Secretary's separate action. Pet. App. 17a-27a. Noting that Section 1132(a) gives the Secretary "an independent and unqualified right to sue and seek redress for ERISA violations because ERISA plans significantly affect the 'national public interest,'" the court explained that, unlike private litigants, the Secretary sues:

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[6] The court also held that the Secretary's suit was barred by laches and by a release of claims included in the *Knop* settlement. Pet. App. 45a-46a, 48a-49a. The court of appeals reversed those holdings, see *id.* at 20a n.17, 27a-29a, and petitioners do not renew them in this Court.

> not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

Id. at 18a. After reviewing other cases that have held that the Secretary is not bound by prior private litigation when she files her own ERISA enforcement action (*id.* at 20a-22a), the court concluded that that result is "consistent with the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests" (*id.* at 22a-23a). Applying that principle to ERISA, the court reasoned:

> The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and 'parties in interest' from ERISA violations. Furthermore, the public treasury is ill-served by denying the Secretary the opportunity to assess civil penalties, expressly authorized by Congress to deter ERISA violations, as well as the occasion to ensure that the Plan receives full value for the millions of dollars in tax subsidies.

Id. at 26a.

The court of appeals rejected the district court's view that the Secretary must intervene in private litigation under Section 1132(h) in order to avoid preclusion of her own claims. Pet. App 26a-27a. The court concluded that the Act leaves the decision whether to

intervene to the discretion of the Secretary, and that, given the volume of ERISA cases the Department monitors, it would be "unreasonable and unwise to require the Secretary to intervene in every ERISA action or be precluded." *Ibid.* The court accordingly remanded the case for further proceedings on the merits of the Secretary's claims.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The case, moreover, is in an interlocutory posture, because the court of appeals at this stage has merely remanded for consideration of the Secretary's claims on the merits. There is accordingly no reason for further review.

1. a. Petitioners argue that their settlement with plan participants in the *Knop* action precludes any claim by the Secretary for monetary relief. 98-758 Pet. 10-22; 98-762 Pet. 6-25. The general rule, however, is that a prior judgment binds only parties to the proceeding in which it was entered. See, *e.g.*, *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996). Although there is an exception to that rule "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment," in this context "privity" is essentially a matter of identity of interests. *Ibid.* As the court of appeals recognized, no such identity generally exists between public and private plaintiffs "when the government's action seeks to enforce a federal statute that implicates both public and private interests." Pet. App. 22a-23a; see 18 C.A. Wright et al., *Federal Practice and Procedure* § 4458, at 520 & n.40 (1981) (citing *City of Richmond* v. *United States*, 422 U.S. 358, 373 n.6

(1975), and *Durfee* v. *Duke*, 375 U.S. 106, 115-116 (1963)); 18 J.W. Moore, *Moore's Federal Practice* § 131.40[3][e][ii][B], at 131-149 & n.89 (3d ed. 1998) (citing *Sam Fox Publ'g Co.* v. *United States*, 366 U.S. 683, 690 (1961)); see also *Mississippi* v. *Louisiana*, 506 U.S. 73, 78 (1992) (State not bound by private litigation to establish property boundaries).

The court of appeals correctly concluded that, although 29 U.S.C. 1132 (1994 & Supp. II 1996) authorizes suits both by the Secretary and by private parties, the Secretary represents national public interests that are separate and distinct from those of any private litigant. Pet. App. 18a-19a. In enacting ERISA, Congress found that plans like the Charter ESOP "are affected with a national public interest"; that they directly affect the well-being of millions of employees and their dependents and are important to the national economy; and that they substantially affect the revenues of the United States because they are afforded preferential tax treatment. 29 U.S.C. 1001(a); see 26 U.S.C. 401(a) (1994 & Supp. II 1996) (requirements for tax-qualified pension plans, including ESOPs), 404(a)(9) (1994 & Supp. II 1996) (deductibility of employer contributions to an ESOP), 501(a) (tax-exempt status for qualified plans). Accordingly, when the Secretary sues under ERISA, she seeks not only to recoup losses for a plan, but to further the government's interests in ensuring uniform compliance with ERISA, exposing and deterring plan asset mismanagement, protecting the integrity of the federal tax system, safeguarding the enormous amount of money held in and invested by ERISA plans, and assessing civil penalties in the circumstances intended by Congress. See Pet. App. 18a; compare *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 & n.8 (1980). Because private

litigants cannot adequately represent those governmental interests, they are not in "privity" with the Secretary, and the resolution of a private suit such as the *Knop* action cannot bar an independent action by the Secretary. *Id.* at 20a-26a; accord *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 688-694 (7th Cir. 1986) (en banc).

b. Petitioners concede the lack of privity with respect to nonmonetary relief, such as the restrictions ultimately imposed, in settlement of the Secretary's suit, on SCNB's ability to serve as an ESOP fiduciary. They argue, however, that the public interests represented by the Secretary do not extend to any monetary relief that, although obtained by the Secretary's suit, would be paid to the plan. In that context, they contend, the Secretary has no broader interest than any private litigant who sues solely to vindicate the immediate monetary interests of the plan. See 98-758 Pet. 12-13; 98-762 Pet. 6, 8, 9-10.[7]

That contention is without merit. When the Secretary chooses to bring suit to remedy violations of ERISA, her interests in obtaining any and all relief authorized by the Act are independent of, and transcend, the interests of any private party, including those of the particular plan or plans to which all or part of a monetary recovery might be paid. That result does not change simply because *some* of the Secretary's

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[7] SCNB appears to concede that the Secretary has independent authority to proceed under 29 U.S.C. 1132(a)(5); it argues only that the Secretary cannot proceed against it under Section 1132(a)(2) because the *Knop* action involved, among other things, a private claim under that Section. See 98-762 Pet. 16-17. The Fickling petitioners, who have been sued under Section 1132(a)(5), argue more broadly that the Secretary cannot obtain monetary relief under either provision. See 98-758 Pet. 10-16, 22-28.

interests may coincide with those of an injured plan or its participants or beneficiaries. See *Fitzsimmons*, 805 F.2d at 691-692 n.12; cf. *General Telphone*, 446 U.S. at 326 ("When the EEOC acts [by bringing a suit seeking both injunctive relief and backpay], albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").[8]

Moreover, and quite concretely, a suit by the Secretary for monetary relief seeks not only to recoup losses or to secure equitable monetary relief on behalf of the plan, but also to provide the basis for assessing the civil penalties required by 29 U.S.C. 1132(*l*), which Congress has determined are necessary to deter ERISA violations and to enhance the legal protection of all plan participants and beneficiaries. See H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 432-433 (1989). Those penalties, which are payable to the United States, are calculated as a percentage of any amount recovered in a suit by the Secretary, and there is no comparable provision for penalties based on awards in private suits. Thus, even with respect to monetary relief that is itself payable only to a particular plan, an action by the Secretary is never *solely* representative of the financial interests of that plan or its participants or beneficiaries.[9]

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[8] Of course, the fact that different plaintiffs have different interests should not lead to double recovery. The Secretary has always contemplated that any monetary relief ordered as a result of her suit and payable to the Charter ESOP would be offset by amounts paid to the plan as a result of the *Knop* action. Compare *General Telephone*, 446 U.S. at 330.

[9] As petitioners note (98-762 Pet. 3-4; see 98-758 Pet. 12), the Secretary argued during investigation and discovery related to the Charter ESOP that SCNB was required to produce certain docu-

For the same reasons, SCNB errs in relying (98-762 Pet. 9-10, 13-16) on this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). *Russell* held (*id.* at 138) that a fiduciary may not be held liable for compensatory or punitive damages in an action by a participant under 29 U.S.C. 1109(a) and 1132(a)(2). The Court reasoned that the Act's detailed provisions for securing relief that inures to the benefit of the plan as a whole indicate that Congress did not intend to authorize the award of extracontractual damages to particular participants. 473 U.S. at 139-148. It was in that context that the Court noted, as SCNB points out (98-762 Pet. 16), that "[i]nclusion of the Secretary of Labor [as an authorized plaintiff under Section 1132(a)(2)] is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." 473 U.S. at 142 n.9. That observation accurately reflects the fact that when the Secretary litigates under ERISA she acts in the interests of plans and all their participants and beneficiaries, not on behalf of particular individuals who may have been specially injured by a violation of the Act. It does not, however, suggest that the Secretary's interest in ERISA enforcement litigation is limited to

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ments because a trustee has no privilege to withhold documents from plan participants or beneficiaries, see, *e.g.*, *Wildbur* v. *Arco Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992), and the Secretary was acting on behalf of and in the interests of participants and beneficiaries in her investigation. The Secretary never contended, however, that her interests were limited to those of participants and beneficiaries, or that her interests would always coincide with theirs. See also *Fitzsimmons*, 805 F.2d at 697 n.18 (rejecting similar res judicata argument based on the Secretary's position in discovery).

obtaining relief for plans, or that she sues, under the Act, only in some narrow representative capacity analogous to that of the named plaintiff in a private class action. See *Fitzsimmons*, 805 F.2d at 691-692 n.12; cf. *General Telephone*, 446 U.S. at 326, 332-333.

Similarly, petitioners err in arguing (see 98-758 Pet. 10-13; 98-762 Pet. 6, 8, 10-11) that the court of appeals' decision departs from principles of res judicata that this Court has recognized in other cases, primarily *Heckman* v. *United States*, 224 U.S. 413 (1912), and *Chicago, Rock Island & Pacific Railway* v. *Schendel*, 270 U.S. 611 (1926). *Heckman* held in part that individual Indian recipients of federal allotments of tribal land were not necessary parties to a suit by the United States to set aside conveyances made in violation of the federal law governing the allotments, and that the decree in such a suit would nonetheless bind the Indian allottees. 224 U.S. at 444-447. That conclusion was based in large part on the federal government's unique trust relationship with the Indians, "the plenary control of Congress in legislating for the protection of the Indians under its care," and the details of the particular federal statutory scheme involved—matters that find little analogue in the ERISA context. *Id.* at 444-445; see *id.* at 444-446 (citing cases involving binding effect on beneficiaries of suits by or against trustees); see also, *e.g.*, *id.* at 442 (relying on the United States' "interest springing from its peculiar relations to the Indians and the [relevant historical] course of dealing"). There is no similar relationship of trusteeship, guardianship, or dependency between the Secretary and the private litigants who are authorized to sue under 29 U.S.C. 1132(a) (1994 & Supp. II 1996). And even if *Heckman* could be read to support preclusion of *private* ERISA litigation on the basis of a prior suit by the *Secretary* (a reading we do

not suggest), it surely would not support the converse argument—*i.e.*, that litigation by interested private parties could ever take the place of suit by the public "trustee." See 224 U.S. at 445 (Indians were "precluded from taking any position in the legal proceedings instituted by the Government * * * which would render such proceedings ineffectual or give support to the prohibited acts. * * * [T]hey could not compromise [the claim]; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit.").

Petitioners' reliance on *Schendel* is likewise unavailing. That case involved the preclusive effect of a worker's compensation judgment in one case, in which the employee's widow was a party, in a second case brought "in the name of [a] personal representative, for the sole benefit of the widow." 270 U.S. at 617. In discussing the applicable principles of res judicata, the Court described with apparent approval a lower-court decision in which "a suit in the name of the government was brought to enforce the right of a private party, [and] it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government." *Id.* at 619, discussing *United States* v. *Des Moines Valley R.R.*, 84 F. 40 (8th Cir. 1897). The clear premise of the Court's discussion in *Schendel*, however, was that the nominal plaintiff in the second suit at issue—like the government in *Des Moines Valley*—had "statutory authority * * * to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the

widow." 270 U.S. at 620; see also *id.* at 619 (government sued "for the sole benefit of [a private party]," and as "a merely nominal plaintiff" (quoting *Des Moines Valley R.R.*, 84 F. at 44, 45)); *id.* at 620-622 (discussing other cases).[10] Reference to *Schendel* thus begs the question in this case, which is whether the Secretary represents *more* than merely private interests whenever she brings an enforcement action under ERISA. The court of appeals correctly determined that she does.

c. The court of appeals' decision in this case is consistent with the decisions of all other courts of appeals that have considered the preclusive effect of private litigation on an action by the Secretary under ERISA. See *Beck* v. *Levering*, 947 F.2d 639, 642 (2d Cir. 1991), cert. denied, 504 U.S. 909 (1992); *Fitzsimmons*, 805 F.2d at 688-694; *Donovan* v. *Cunningham*, 716 F.2d 1455, 1462-1463 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). Two of those courts have expressly recognized that res judicata does not prevent the Secretary from obtaining monetary relief in a subsequent action. See *Beck*, 947 F.2d at 642 (argument that res judicata bars the Secretary is "frivolous"); *Fitzsimmons*, 805 F.2d at 692-694 (Secretary not bound by res judicata), 696 (Secretary sought both injunctive relief and money lost through trustees' mismanagement); cf. *Cunningham*, 716 F.2d at 1462-1463 n.10 (district court to consider scope of relief on remand).[11]

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[10] *Des Moines Valley* itself expressly recognized that a claim by the government would not be precluded if the government "had a substantial interest in the controversy." 84 F. at 45.

[11] SCNB recognizes the precedential force of *Fitzsimmons*, but argues that it was wrongly decided. 98-762 Pet. 21-23. The Ficklings contend incorrectly that *Fitzsimmons* involved only claims for injunctive relief. 98-758 Pet. 16-17 n.11. The district

Petitioners err in contending that the decision below conflicts with appellate decisions that have applied claim preclusion principles under other statutes. 98-758 Pet. 13-16; 98-762 Pet. 11-12. Most of the cases petitioners cite hold or suggest that, while private litigation will not bar actions by the Equal Employment Opportunity Commission (EEOC) for injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, it can bar the EEOC from obtaining back pay for individuals who resolved their back pay claims in earlier litigation. See, *e.g.*, *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298, 301-302 (2d Cir. 1998) (ADEA); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1289-1293 (7th Cir. 1993) (ADEA and Title VII); *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 493-497 (3d Cir. 1990) (ADEA); *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (ADEA); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-1543 (9th Cir. 1987) (Title VII). Even if those decisions are correct, however, the court below properly recognized that petitioners' argument

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courts have also uniformly held that the Secretary and private litigants are not in "privity" for these purposes. See *Mason Tenders Dist. Council Pension Fund* v. *Messera*, 958 F. Supp. 869, 885 (S.D.N.Y. 1997); *Jackson* v. *Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1132 n.9 (D. Mass. 1996); *Picardi* v. *Chicago Truck Drivers*, 581 F. Supp. 794, 797 (N.D. Ill. 1983). Lower courts have also reached similar conclusions with regard to federal securities and fair-housing litigation. See *SEC* v. *Egan*, 856 F. Supp. 401, 402 (N.D. Ill. 1993); *SEC* v. *Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); *Tellurian U.C.A.N., Inc.* v. *Goodrich*, 504 N.W.2d 342, 345 (Wis. Ct. App. 1993).

"ignores the different statutory enforcement schemes of Title VII and the ADEA." Pet. App. 25a n.22.

Title VII and the ADEA require individuals to file charges with the EEOC, which must then investigate and attempt to eliminate statutory violations by conference, conciliation, and persuasion. See 29 U.S.C. 626(d); 42 U.S.C. 2000e-5(b), (e) and (f). Private litigants cannot sue until the EEOC issues a right to sue letter under Title VII, and cannot sue at all under the ADEA if the EEOC chooses to sue with respect to their claim. 29 U.S.C. 626(c)(1); 42 U.S.C. 2000e-5(b). In contrast, ERISA gives participants, beneficiaries, fiduciaries, and the Secretary entirely independent authority to bring suit, and nothing in ERISA requires private litigants to present claims to the Secretary, vests conciliation authority in the Secretary, or otherwise limits a private litigant's ability to bring (or compromise) a court action. See 29 U.S.C. 1132 (1994 & Supp. II 1996).

We may assume for present purposes that the protection for broader public interests that is afforded by the EEOC's mandatory pre-litigation involvement, and its large degree of control over the initiation of private litigation, may justify according such litigation some limited preclusive effect with respect to later public suits. But see *General Telephone*, 446 U.S. at 332 (actions by EEOC need not comply with class-action requirements; "We are sensitive to the importance of the res judicata aspects of Rule 23 judgments, but we are not free to depart from what we believe the statutory design to be.") However that may be, under ERISA the public interest is protected primarily by the Secretary's right to sue (or, at her option, to intervene in private litigation); and her enforcement of ERISA must not be prejudiced by the

actions of private litigants who are unaccountable to the Secretary or to the public interests that she represents.[12]

d. Contrary to petitioners' arguments (98-758 Pet. 21-22; 98-762 Pet. 24-25) the decision below will not disrupt the "sound administration of justice" by interfering with private settlements under ERISA. Individuals who are responsible for ERISA violations have known at least since the Seventh Circuit's 1986 decision in *Fitzsimmons* that a settlement with private litigants will not preclude a suit by the Secretary. They also continue to be subject to injunctive relief in actions brought by the Secretary (as petitioners concede), and to possible criminal sanctions for willful violations of ERISA. See 18 U.S.C. 664, 1001 (Supp. II 1996), 1027; 29 U.S.C. 1131; *Martin* v. *Rutledge*, 807 F. Supp. 693, 697 (N.D. Ala. 1992) (requiring restitution of plan losses, following a criminal conviction, pursuant to 18 U.S.C. 3663(e)(2)), aff'd, 996 F.2d 1232 (11th Cir. 1993)

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[12] None of the other allegedly conflicting appellate cases cited by petitioners (see 98-758 Pet. 14-15; 98-762 Pet. 11-12) bears any reasonable relation to the Secretary's prosecution of an ERISA action, pursuant to an independent grant of litigation authority, but without any right to bar or control prior private suits. See *In re Schimmels*, 127 F.3d 875, 877 n.1, 881-884 (9th Cir. 1997) (government precluded by qui tam action under False Claims Act, under which a private litigant sues on behalf of the government if the government declines to do so, see 31 U.S.C. 3730(b)); *In re Imperial Corp.*, 92 F.3d 1503, 1509 (9th Cir. 1996) (Federal Deposit Insurance Corporation, suing in its capacity as a receiver, does not sue as the United States, but stands in the shoes of an insolvent private institution); *NLRB* v. *Donna-Lee Sportswear Co.*, 836 F.2d 31, 34-37 (1st Cir. 1987) (National Labor Relations Board precluded, under particular facts, from finding that a contract exists when a district court held in a previous suit by a union that no contract existed).

(Table), cert. denied, 510 U.S. 1191 (1994). In any event, the greater threat to the "sound administration of justice" is the position advocated by petitioners, which would allow private litigants to settle claims involving serious ERISA violations in a way that affords affected plans a minimal recovery of their losses, immunizes wrongdoers from liability even if they themselves contribute little or nothing of value to the settlement, and gives no consideration to the public interests in safeguarding the stability of tax-subsidized pension funds, ensuring that the government receives full value for those subsidies, and allowing the Secretary to assess the civil penalties that Congress has determined are necessary to deter mismanagement of plan assets. See Pet. App. 24a-27a (discussing proceedings in this case).[13]

2. The Ficklings also argue that 29 U.S.C. 1132(a)(5) does not authorize the Secretary to seek equitable relief against a nonfiduciary party in interest who has engaged in a transaction prohibited by 29 U.S.C. 1106(a).

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[13] The Ficklings also argue (98-758 Pet. 19-21) that the Secretary's suit should be precluded because the *Knop* litigation was brought as a class action and resulted in judicial approval of a class settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure. That rule in fact cuts against the Ficklings' argument, because it requires adequate representation, see Fed. R. Civ. P. 23(a)(4), and the named plaintiffs in *Knop* did not even purport to represent the Secretary's interests. See *Fitzsimmons*, 805 F.2d at 693 n.13. The Ficklings also erroneously accuse the Secretary of "willfully avoid[ing]" the class action fairness hearing after stating that the Secretary did not want to impede approval of the private settlement. 98-758 Pet. 21. As discussed above (see pp. 4-5, *supra*), however, the Secretary made it quite clear to the private litigants (and through them to the district court) that she was continuing to investigate and would not be bound by any settlement.

98-758 Pet. 22-28. The court of appeals correctly rejected that contention (Pet. App. 9a-17a), as has every other court of appeals that has addressed the issue. This Court has previously denied review in a case raising a similar challenge to the Secretary's authority under Section 1132(a)(5), and there is no reason for a different result here. See *Stangl* v. *Reich*, 519 U.S. 807 (1996).

a. By its terms, Section 1132(a)(5) authorizes the Secretary to bring an action:

> (A) to enjoin any act or practice which violates any provision of this subchapter [29 U.S.C. 1001-1191c], or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter.

The term "redress" means "the setting right of what is wrong." *The Random House Dictionary of the English Language* 1203 (1966); see also *Webster's Third New International Dictionary* 1904 (1976). And the equitable relief "appropriate" to obtain such redress "includes restitution of ill-gotten plan assets or profits." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 260 (1993).

Section 1106(a) is within the relevant subchapter of the United States Code (codifying Title I of ERISA). It prohibits a plan fiduciary from causing a plan to engage in certain enumerated transactions with (or benefitting) "part[ies] in interest." 29 U.S.C. 1106(a); see 29 U.S.C. 1002(14) (defining "party in interest"). Among other things, it prohibits the sale, transfer, or exchange of plan assets between a plan and a party in interest. 29 U.S.C. 1106(a)(1)(A) and (D). In making such transactions illegal per se, Congress sought "to bar categorically * * * transaction[s] that [were] likely to injure the pension plan." *Commissioner* v. *Keystone*

Consol. Indus., Inc., 508 U.S. 152, 160 (1993). In this case, the Secretary alleges that the February 1990 stock transaction between the ESOP and the Ficklings violated Sections 1106(a)(1)(A) and (D). See Pet. App. 7a. The Secretary's action against the Ficklings is an action for "appropriate equitable relief" (the disgorgement of tens of millions of dollars in wrongful profits) to redress that violation, and to enforce the Act's prohibition against transactions between a plan and a party in interest.

Petitioners point out (98-758 Pet. 24-25) that Section 1106(a) imposes the duty to avoid prohibited transactions on the fiduciary, rather than on participating parties in interest. They suggest, however, no persuasive reason why Congress, in authorizing the Secretary to obtain redress for prohibited transfers of plan assets to parties in interest, would have intended to limit that authority in a way that would prevent the Secretary from recovering those assets from the party who received them.[14] To the contrary, Section 1132(a)(5) is a broadly-worded, "catchall" provision that acts "as a safety net, offering appropriate equitable relief for injuries caused by violations that [Section 1132] does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996); see also Pet. App. 10a-13a (contrasting Section 1132(a)(5), which

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[14] The Ficklings incorrectly assert that the government, in its amicus curiae brief in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996) (No. 95-809), "conceded" that "Title I of ERISA" speaks only to the lawfulness of fiduciary conduct, rather than to the lawfulness of particular transactions. 98-758 Pet. 24. It suffices to point out that the government's brief in *Spink* expressly argued that Section 1132(a) authorizes equitable relief against parties in interest. 95-809 U.S. Br. 3 n.3. This Court noted but reserved the question. 517 U.S. at 889 n.3.

provides only equitable relief but does not limit the persons who can be sued, with Section 1132(a)(2), which permits claims for broader relief, but only against fiduciaries). Because the "act or practice" of engaging in a transaction prohibited by Section 1106(a) by definition requires the participation of a party in interest, authorization of an action to provide equitable relief "to redress such [a] violation" and to "enforce" the prohibition necessarily includes authorization of relief against such parties. 29 U.S.C. 1132(a)(5); see, *e.g.*, *Reich* v. *Stangl*, 73 F.3d 1027, 1031 (10th Cir.) (contrary result would "create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions"), cert. denied, 519 U.S. 807 (1996); *Nieto* v. *Ecker*, 845 F.2d 868, 874 (9th Cir. 1988) ("Courts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them."). Indeed, even if the statutory language were amenable to differing interpretations, it is hard to conceive of "any ERISA-related purpose that denial of a remedy would serve." *Varity Corp.*, 516 U.S. at 515.

Petitioners also contend (98-758 Pet. 24-28) that Congress limited the Secretary of Labor's enforcement authority under Title I of ERISA to actions against fiduciaries, delegating to the Secretary of the Treasury the sole authority to proceed against parties in interest through the assessment of excise taxes. The tax treatment of prohibited transactions instead supports the Secretary's position. Before imposing an excise tax on a party in interest, the Secretary of the Treasury must provide the Secretary of Labor with an opportunity to obtain "correction" of the prohibited transaction.

26 U.S.C. 4975(h).[15] The term "correction" is defined as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. 4975(f)(5). The clear implication of those provisions is that the Secretary of Labor has the authority to seek equitable relief against a party in interest when such relief is necessary to "correct[]" the prohibited transaction.[16]

b. As petitioners acknowledge, every court of appeals that has considered the issue has rejected petitioners' constricted interpretation of Section 1132(a)(5). See 98-758 Pet. 9-10 & n.7, 23; Pet. App. 9a-17a; *LeBlanc* v. *Cahill*, 153 F.3d 134, 149-153 (4th Cir. 1998); *Stangl*, 73 F.3d at 1030-1031; *Landwehr* v. *DuPree*, 72 F.3d 726, 734-735 (9th Cir. 1995); *Reich* v. *Compton*, 57 F.3d 270, 285-287 (3d Cir. 1995); see also *Reich* v. *Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994) (dicta).[17] Petitioners

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[15] The Internal Revenue Code refers to "disqualified person[s]," but the definition of that term is substantially equivalent to the definition of "party in interest." Compare 26 U.S.C. 4975(e)(2) with 29 U.S.C. 1002(14).

[16] Petitioners also cite legislative history in support of their position. 98-758 Pet. 26-27. While that history may indicate that "the fiduciary is the main focus of the prohibited transaction rules" under Title I of ERISA, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974), it does not suggest that Section 1132(a)(5) provides no "other appropriate equitable relief" against nonfiduciary parties in interest. See *Stangl*, 73 F.3d at 1032-1034.

[17] Petitioners argue (98-758 Pet. 10, 23) that the Fourth Circuit's recent decision in *LeBlanc* evinces "increasing disarray" among the courts of appeals because it imposes liability on nonfiduciaries who participate in transactions prohibited by Section 1106(b)—which does not require the involvement of a "party in interest"—as well as transactions prohibited by Section 1106(a).

nevertheless contend (98-758 Pet. 24) that this Court's review is necessary in order to "reaffirm" the "basic teaching" of *Mertens* v. *Hewitt Associates*. *Mertens*, however, supports the decision below.

Mertens held that Section 1132(a)'s provisions authorizing "other appropriate equitable relief" do not authorize the award of money damages. 508 U.S. at 251-262. In reaching that conclusion, the Court also questioned whether ERISA authorized the award of *any* relief against a nonfiduciary who merely knowingly participated in a fiduciary's breach of duty. But the Court recognized that some provisions of ERISA, including 29 U.S.C. 1106(a), could be read to impose particular obligations on nonfiduciaries; and, indeed, the *Mertens* opinion expressly states that a service provider (normally a party in interest, but not a fiduciary) must disgorge assets and profits obtained through participation as a party in interest in transactions prohibited by Section 1106. *Id.* at 253-254 & n.4, 262. Thus, the court of appeals correctly read *Mertens* to support the Secretary's action for similar relief against the Fickling petitioners. Pet. App. 14a-17a; see also *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 889 n.3 (1996)

They also cite the Seventh Circuit's rejection, in *Reich* v. *Continental Casualty Co.*, 33 F.3d 754, 757 (1994), cert. denied, 513 U.S. 1152 (1995), of a construction of Section 1132(a) that would impose liability on any party that "knowingly participated" in any breach of fiduciary duty. Nothing in the decision below, however, is inconsistent with the holding in *Continental Casualty* (see Pet. App. 11a-13a, distinguishing the court of appeals' previous decision in *Useden* v. *Acker*, *supra*, which is consistent with *Continental Casualty*); and any additional issue raised in *LeBlanc* is irrelevant to this case, which involves only parties in interest whose liability is predicated on participation in transactions prohibited under Section 1106(a).

(noting that a number of courts of appeals have so read *Mertens*, and reserving the question). In the absence of any disagreement among the courts of appeals, that issue does not warrant further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor

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